# The Government Procurement Review

Editors
Jonathan Davey and James Falle

Law Business Research

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# EDITORS' PREFACE

It is our very great pleasure to introduce this first edition of *The Government Procurement Review*. The first edition brings together contributions from eminent procurement lawyers across five continents and provides real insight to the key issues in government procurement across the different jurisdictions.

The importance of government contracts for the economy cannot be overstated. Indeed, these contracts often account for 10 to 20 per cent of GDP in any given state. While Keynesian economic theory suggests that increased government spending will support growth in times of recession, in practice the ongoing downturn has often been accompanied instead by austerity and government cuts have been the byword. Nevertheless, the debate continues as to whether the continuing economic torpor is best treated by tax and spend or by deficit reduction, and there are some signs of possibly changing policy to be gleaned from the rhetoric coming from various institutions. It will be interesting to see in the coming year or so how this affects the opportunities for private sector suppliers to bid for public contracts. Certainly, even though government spending has been curbed, the cumulative value of government contracts remains considerable and they still offer a significant opportunity for many firms.

Against this backdrop of ongoing fiscal stress, it is perhaps not surprising that certain common themes emerge from national chapters. In particular, we note policy considerations aimed at improving efficiencies or at improving the lot of local providers. Additionally, promotion of small and medium-sized enterprises ('SMEs') is a particular focus of attention, whether because the SME is viewed as more efficient or because it is likely to be locally based.

Other noticeable common threads that run through the different national legal systems are worthy of note. The systems of most, if not all, jurisdictions now embrace the key principles of transparency, value for money and objectivity. These principles go hand in hand with the continuing drive against corruption and bribery. These threads are now embedded in the UNCITRAL Model Law on Public Procurement, updated in 2011, and the guidance contained in the 2012 Guide to Enactment, together with the WTO's Government Procurement Agreement ('GPA') and the EU directives.

At the same time, there are some significant divergences in national approaches. Perhaps most notably, some national laws seek to treat all contractors equally without distinction as to the origin of the supplier, or at least give equal access to suppliers from states that are parties to a multilateral agreement – as is the case for all GPA members. Other legal systems overtly favour national sourcing, for example by explicitly reserving certain contracts for national suppliers.

While there seems to be a trend towards disappointed bidders being more willing to challenge authorities' award decisions, it is perhaps not surprising that there is considerable variance in the number of challenges brought within the different jurisdictions and the legal remedies available to disappointed bidders vary hugely from one country to the next. No doubt there are many reasons for this variance in the frequency of challenge, such as the relative complexity and cost of bringing challenges in some states compared with others; whether the jurisdiction has specialist procurement tribunals; the speed with which the courts might be expected to dispose of a claim; and the remedies that could be available (for example, can the courts cancel the award decision or are they restricted to awarding damages to the claimant?).

An often vexed question for procurement lawyers is how land transactions should be treated. In particular, if a public authority sells land with a clear understanding that the purchaser will develop it in a particular way, is this subject to the procurement rules? In some jurisdictions, land transactions are regulated by the same rules as government purchasing; in others, unless the land disposal can be said to constitute a public works contract, then it is unregulated from a procurement law perspective (although other rules may come into play such as those relating to state aid and to obtaining proper value for the disposal).

It is also noteworthy that different jurisdictions take different approaches to the scope of procurement regulation. For example, in the field of utilities, contracts awarded by privately owned utilities are sometimes regulated by national procurement law where the utilities enjoy special or exclusive rights. However, this is not universally the case and, in other jurisdictions, only state-owned utilities are regulated.

Probably the largest cross-border market of all is defence. This remains a key focus for lawyers, following controversies such as the US Air Force's $35 billion tanker contract and, in the EU, the bedding down of the Defence Directive.

Overall, we continue to see procurement law evolving internationally. The UNCITRAL Model Law on Public Procurement was last updated as recently as 2011 and the GPA text was revised in 2012. And there is a major reform package going through the EU institutions at present, which could be on the EU statute books late in 2013 or, perhaps more realistically, in 2014. Among the many EU reforms is expected to be the regulation of service concession contracts, which have hitherto only been lightly touched upon by the EU rules but are of considerable economic importance in some Member States. Meanwhile, UNCITRAL is exploring possible future work in the area of public-private partnerships.

It is worth highlighting that in the European Union, rules are made at EU level and then implemented by each Member State. Underlying these EU rules is the desire to create an EU single market where EU suppliers can compete on a level playing field, whatever their nationality. When considering the rules in Belgium, France, Germany, Greece, Italy, Luxembourg, Portugal, Romania, Spain or the United Kingdom, the

reader may find it helpful to refer to both the European Union chapter and the relevant national chapter, as the authors have sought as far as possible to avoid simply repeating the EU rules when setting out the noteworthy features within their national jurisdiction.

Finally, we would like to thank all the contributors for their hard work in producing their national chapters. We also wish to acknowledge the tireless work of the publishers in collating what we hope you will find is a helpful and interesting publication. We believe that this annual publication will provide a valuable source of comparative information on procurement to international businesses operating or seeking to operate cross-border, policymakers, academics and practitioners alike.

**Jonathan Davey and James Falle**
Addleshaw Goddard LLP
London
May 2013

# Chapter 20

# UNITED STATES

*Richard B Clifford, Jr, Andrew E Shipley and Seth Locke*[1]

## I INTRODUCTION

In 2012 government procurement in the United States faced significant fiscal and budgetary pressures coupled with intensified statutory and regulatory acquisition reform initiatives. With tightening budgets and the looming spectre of sequestration, government agency acquisition officials were required to do more with less, hampered by restrictions on the hiring of new employees and the gradual retirement of an ageing, experienced professional workforce. In turn, government contractors grappled with fewer contracts and new requirements for cybersecurity, renewed enforcement of anti-corruption laws, increased government access to contractor records, additional cost and performance risk in contracting, and new measures implementing government policy objectives. These new initiatives extended not only to the selection and award of government contracts but also to the performance and administration of these contracts. United States government contractors and the federal government agency acquisition community struggled to embrace these reforms in the midst of budget cuts and fiscal uncertainty.

This chapter discusses the major developments in the United States procurement system during 2012. The chapter is not intended to detail in exhaustive fashion all the changes in the United States' methods of acquiring goods and services. Rather, this chapter focuses on those influential events likely to have long-standing impact in the procurement arena in the years to come.

1 Richard B Clifford, Jr and Andrew E Shipley are partners and Seth Locke is an associate at Perkins Coie LLP.

## II YEAR IN REVIEW

Fiscal Year ('FY') 2012 marked the largest dollar reduction in government procurement spending in the history of the United States. According to the Office of Management and Budget ('OMB'), the Obama administration reduced government contract spending by over $20 billion in FY 2012 compared with FY 2011. This follows a three-year downward trend from 2009–2012, with total spending on contracts in FY 2012 at some $35 billion less than in FY 2009. According to the OMB, '[t]his decline represents a dramatic reversal of the unsustainable 12 per cent contract spending growth rate experienced from 2000 through 2008.'[2]

With shrinking dollars, agency procurement officials have been required to execute purchasing more efficiently. Management support services and wartime contingency contracting were two targeted areas for budget cuts: the OMB reports that government agencies reduced management support services spending by some $7 billion over the last two years, meeting the administration's goal of reducing such spending by 15 per cent.[3] In addition, agencies also have coordinated purchases through strategic sourcing, both at the government-wide and agency level, to get the same goods and services at lower prices.[4]

In conjunction with these unprecedented spending reductions and 'smarter' purchasing initiatives, the United States government procurement system experienced important acquisition reforms in 2012. Most recently, Congress passed the Fiscal Year 2013 National Defense Authorization Act ('FY 2013 NDAA') in December 2012, which President Obama signed into law on 2 January 2013. The FY 2013 NDAA contains numerous provisions designed to promote efficiency, transparency, accountability and enhanced enforcement of government rights. These provisions bolster other 2012 reforms that added whistle-blower protections, requirements for combating trafficking in persons, cybersecurity, government access to internal audit reports, limitations on cost-sharing contracts, and new rules for small business and wartime contingency contracting. Contractors must wrestle with these new requirements in the face of an ever-shrinking budget.

Another notable trend in 2012 was the continued rise in government contract-related disputes, namely bid protest cases and False Claims Act litigation. According to the Government Accountability Office ('GAO'), contractors filed 2,475 bid protests in FY 2012, a 5 per cent increase from FY 2011. GAO bid protest filings have increased for the last six consecutive years with 75 per cent more bid protests filed in FY 2012 than in FY 2007. The GAO sustained 106 bid protests in FY 2012 (18.6 per cent), some 39 more than in FY 2011. Overall, contractors obtained favourable relief in approximately

2 www.whitehouse.gov.blog, 'Historic Savings in Contracting – and Plans for More', Joe Jordan, 6 December 2012.

3 Id.

4 Memorandum from Deputy Director for Management, Executive Office of the President, Office of Management and Budget, *Improving Acquisition through Strategic Sourcing*, dated 5 December 2012.

40 per cent of GAO bid protests in 2012, a similar success rate over the past two years.[5] Likely contributors to the rise in bid protest activity are the reduction in the number of awarded contracts and increased competition among contractors. Moreover, recent legislative changes to the False Claims Act[6] have expanded the theories of liability under which the government and whistle-blower 'relators' can seek recovery against contractors. For FY 2012, the Department of Justice reported a record recovery of $5 billion in civil cases alleging fraud against the government.[7] United States government contractors therefore were faced with increased payouts in False Claims Act cases in 2012, even as government contract spending decreased.

These were among the pressures faced by government contractors and federal acquisition officials in the 2012 procurement environment. Against this backdrop, we discuss in more detail the significant, individual developments in United States government procurement last year, including major statutory and regulatory initiatives, and bid protest cases.

## III SCOPE OF PROCUREMENT REGULATION

A number of the 2012 changes to procurement regulations reflect social policy goals promoted by the government, ranging from protecting certain classes of people to enhancing corporate compliance requirements. The following discussion addresses some of the more prominent changes, including those designed to protect whistle-blowers, attack human trafficking, safeguard information systems, publicise corporate executive compensation, provide increased government oversight of contractors' business systems, prevent awards to inverted domestic corporations, and enhance the government's rights in technical data and computer software.

### i Whistle-blower protections

As part of the government's continuing commitment to root out fraud, waste and abuse, President Obama signed into law the Whistle-blower Protection Enhancement Act of 2012 on 27 November 2012. Congress originally passed the Whistle-blower Protection Act in 1989 to protect from retaliation federal employees who disclose evidence of a violation of any law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[8] The 2012 Whistle-blower Protection Enhancement Act, as the name implies, builds upon the framework already in place to provide additional protections to federal employees who disclose fraud, waste and abuse. The purpose of the amendments is to further encourage federal employees to disclose bad acts in federal contracting.

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5 United States Government Accountability Office, *Report to Congress on Bid Protest Statistics*, B-158766 (13 November 2012).

6 31 U.S.C. Section 3729.

7 Department of Justice, Office of Public Affairs, Press Release, *Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012*, (4 December 2012).

8 5 U.S.C. Section 1213 et seq.

For instance, the Whistle-blower Protection Act now protects employees who reveal information that may have been previously disclosed.[9] In other words, the law no longer requires a person to be the first to disclose. The amendments also made changes to 5 U.S.C. Section 1215, which governs disciplinary actions for prohibited personnel actions.[10] Now, the Merit Systems Protection Board, which hears federal employee appeals regarding merit issues, has express authority to impose any combination of the following disciplinary actions:

*a* removal;
*b* reduction in grade;
*c* debarment from federal employment for a period not exceeding five years;
*d* suspension;
*e* reprimand; or
*f* a penalty not exceeding $1,000.[11]

Moreover, the employee accused of taking, or failing to take, personnel actions related to the disclosure bears the burden of proof, by substantial evidence, that he or she would have taken or failed to take the same personnel action in the absence of the protected disclosure.[12] Finally, the amendments suspended the requirement that all Merit Systems Protections Board appeals proceed to the United States Court of Appeals for the Federal Circuit.[13] The suspension is scheduled for two years and allows the regional circuits to hear such appeals during that period beginning on the effective date of the Act.[14]

In summary, the Whistle-blower Protection Enhancement Act of 2012 strengthens protections for federal employees who disclose instances of violations of law or regulations or evidence of fraud, waste, or abuse. These additional protections will likely encourage disclosures, meaning contractors should be prepared for an increase in federal employee False Claims Act cases.

**ii Provisions against human trafficking**

In 2012, the federal government used its position as the largest procurer of goods and services to address the global problem of human trafficking. To that end, President Obama issued Executive Order 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts, on 25 September 2012. Under the Executive Order, the Federal Acquisition Regulations ('FAR') Council, in cooperation with the heads of the appropriate executive agencies, shall amend the FAR to strengthen the federal government's policy against trafficking in persons by federal contractors and subcontractors in solicitations, contracts and subcontracts for supplies or services.[15]

9 Pub. L. 112-199, Section 101.
10 Id. at Section 106.
11 Id.
12 Id. at Section 103.
13 Id. at Section 108.
14 Id. at Section 108.
15 Executive Order No. 13627 (available at 77 Fed. Reg. 60029).

The FAR Council must amend the FAR to expressly prohibit contractors, contractor employees, subcontractors, and subcontractor employees from engaging in any of the following activities:

*a* using misleading or fraudulent recruitment practices during the recruitment of employees, including the failure to disclose information regarding the key terms and conditions of employment;

*b* charging employees recruitment fees;

*c* destroying, concealing, confiscating, or otherwise denying access by an employee to the employee's identity documents, such as passports or drivers' licences; and

*d* failing to pay return transportation costs for an employee who was brought into the country to perform work on a US government contract or subcontract.[16]

The new regulations will also require a contract clause in all contracts and subcontracts that requires the contractor or subcontractor to cooperate with audits and investigations regarding compliance with the restrictions on trafficking in persons.[17] The rule will also require contracting officers to notify the relevant agency's Inspector General, suspension or debarment officials, and, if appropriate, law enforcement, if they become aware of any violations of the restrictions on trafficking in persons.[18] Additionally, contractors or subcontractors must maintain a compliance plan during the performance of any portion of a contract or subcontract to be performed outside the United States that exceeds $500,000.[19] The compliance programme must include, at a minimum, an awareness programme, a reporting process free from retaliation, a compliant recruitment and wage plan, a housing plan if applicable, and procedures to prevent subcontractors at any tier from engaging in trafficking in persons.[20] The plan must also have procedures to monitor and terminate any subcontractor or subcontractor employee that violates a restriction on trafficking in persons.[21]

Finally, the FAR will require contractors and subcontractors to certify, prior to receiving a contract award, and annually thereafter during the contract, that it has a compliance plan in place and that, to the best of its knowledge and belief, neither it nor any of its subcontractors has violated a restriction against trafficking in persons.[22] Contracts for commercially available off-the-shelf items will be exempt from the compliance plan and certification requirements.[23] In short, the federal government is using the procurement process as a means to help fight human trafficking. Contractors will have to be vigilant, and have the necessary programmes in place to ensure that their employees and subcontractors comply with the regulations.

16 Id. at Section 2(a)(1)(A).

17 Id. at Section 2(a)(1)(B).

18 Id. at Section 2(a)(1)(C).

19 Id. at Section 2(a)(2)(A).

20 Id.

21 Id.

22 Id. at Section 2(a)(2)(B).

23 Id. at Section 3.

### iii Basic safeguarding of contractor information systems

The federal government issued a proposed rule to amend the FAR on 24 August 2012 to add a new subpart and contract clause for the basic safeguarding of contractor information systems.[24] The subpart and clause will apply to all contracts, including commercial items and commercial-off-the-shelf items, where the contractor's systems may contain information provided by or generated for the government (other than public information).[25] The proposed rule would amend the FAR to introduce a new Subpart – Basic Safeguarding of Contractor Information Systems. The Subpart defines 'information', 'public information', and 'safeguarding'. The FAR clause will be found at 52.204-xx. The proposed clause would require the contractor to take protective measures, such as protecting information on public computers or websites, using proper security in transmitting information, using physical and protective barriers and properly sanitising electronic media to safeguard such information.[26] Notably, the proposed changes would mandate only basic safeguarding requirements. The National Archives and Records Administration may impose additional safeguards for protecting the government's unclassified information.

### iv Reporting executive compensation and first-tier subcontract awards

Congress addressed reporting requirements for executive compensation in the Federal Funding Accountability and Transparency Act of 2006.[27] Since that time, the federal government has proposed legislative amendments to the requirements and interim rules to address the issue. The purpose of the reporting requirement is to provide transparency to the public regarding the companies with which the government does business. Effective from 27 August 2012, the government issued a final rule adopting the reporting requirements in FAR clause 52.204-10.[28]

Under the clause, all contractors doing business with the federal government must be registered in the Central Contractor Registration ('CCR') database. The CCR collects contractor information for the government in one central database. As part of the annual registration requirement in the CCR database, contractors must report to the government the names and total compensation of the five most highly compensated executives for the preceding fiscal year.[29] Total compensation includes salary, bonus, awards of stock, stock options, stock appreciation rights, earnings for services under non-equity incentive plans, change in pension value, above-market earnings on deferred compensation that

24 77 Fed. Reg. 51496-02.

25 Id.

26 Additional proposed safeguards include limiting the transmission of voice and fax information, intrusion protection, current and regularly updated malware protection services, prompt application of security-relevant software upgrades, and transfer limitations. Id.

27 Pub. L. 109–282, as amended by Section 6202 of Public Law 110–252.

28 77 Fed. Reg. 44,047.

29 FAR 52.204-10(d).

is not tax-qualified and other compensation that exceeds, in the aggregate, $10,000.[30] Contractors are also required to report, by the end of the month following the month of award of a first-tier subcontract worth more than $25,000, the name of the subcontractor, the amount of the subcontract and other identifying information.[31] The contractor must also annually report the total compensation of the five most highly compensated executives of the subcontractor for the preceding year.[32] The executive compensation reporting requirements only apply to contractors and subcontractors that: (1) received 80 per cent or more of their annual gross revenues from federal contracts (including other forms of financial assistance); (2) received $25 million or more in annual gross revenues from federal contracts (including other forms of financial assistance); and (3) have not reported the same information to the public through other specified means.[33] The subcontract reporting requirements apply to contractors and subcontractors with a gross income for the previous tax year of over $300,000.[34]

### v 'Business systems' rule

The United States Department of Defense ('DoD') adopted a final rule on 24 February 2012 to amend the DoD FAR Supplement ('DFARS') to improve the effectiveness of DoD oversight of contractor business systems.[35] The government first issued two proposed rules in 2010, followed by legislation in the National Defense Authorization Act for Fiscal Year 2011, to ensure that contractor's business systems provide timely, reliable information for the management of DoD programmes.[36] The new contractor business systems DFARS clause can be found at 48 C.F.R. 252.242-7005. The new clause applies only to contracts subject to the cost accounting standards.[37]

Contractor business systems subject to increased oversight include:

*a* accounting systems;
*b* earned value management systems;
*c* estimating systems;
*d* material management and accounting systems;
*e* property management systems; and
*f* purchasing systems.[38]

30 FAR 52.204-10(b). See FAR 52.204-10(b) for additional detail as to what is considered 'total compensation'.
31 FAR 52.20-4-10(d)(2).
32 FAR 52.204-10(d)(3).
33 FAR 52.204-10(d)(1) and (3).
34 FAR 52.204-10(g).
35 77 Fed. Reg. 11,355.
36 Id.
37 DFARS 252.242-7005.
38 DFARS 252.242-7005(b).

Under the clause, a contracting officer can issue an initial determination that a contractor's business system suffers from significant deficiencies.[39] 'Significant deficiency' is defined as 'shortcoming in the system that materially affects the ability of officials of the DoD to rely upon information produced by the system that is needed for management purposes'.[40] The rule incorporates additional DFARS provisions with criteria for each of the covered business systems that serve as the basis for determining whether a significant deficiency exists.[41] Contractors must respond in writing within 30 days of a contracting officer's initial determination.[42] At that point, the contracting officer will issue a final determination as to whether the contractor's business system contains significant deficiencies. If the contracting officer concludes that the business system contains significant deficiencies, then the final determination will include a notice to withhold contract payments.[43] The contractor must correct the noted deficiencies or submit an acceptable corrective action plan within 45 days of receipt of the notice.[44] The rule also provides some protection during this process for slow decision-making on behalf of the government. The contracting officer must reduce the withholding by at least 50 per cent if the contracting officer has not made a determination within 90 days of receipt of the contractor's notification that the contractor corrected the deficiency.[45]

### vi Prohibition on contracting with inverted domestic corporations

On 10 May 2012, the federal government issued an interim FAR amendment prohibiting the award of contracts to any foreign incorporated entity considered to be an inverted domestic corporation.[46] An inverted domestic corporation is a 'foreign incorporated entity which is treated as an inverted domestic corporation under 6 U.S.C. 395(b), i.e., a corporation that used to be incorporated in the United States, or used to be a partnership in the United States, but now is incorporated in a foreign country, or is a subsidiary whose parent corporation is incorporated in a foreign country.'[47] The FAR contained an interim rule covering earlier years that prohibited contracting with inverted domestic corporations. The new interim rule extends the prohibition for FY 2012.[48] Contractors must represent that they are not an inverted domestic corporation or subsidiary in order to be eligible for award using FY 2008 through FY 2010 or FY 2012 funds.[49] Federal agency contracting officers can rely on the contractor's representations unless the

39 DFARS 252.242-7005(d).
40 DFARS 252.242-7005(b).
41 DFARS 252.242-7005(b).
42 DFARS 252.242-7005(d).
43 DFARS 252.242-7005(d)(2).
44 DFARS 252.242-7005(e).
45 DFARS 252.242-7005(e).
46 77 Fed. Reg. 27,547.
47 FAR 9.108-1.
48 Id.
49 FAR 9.108-3(a).

contracting officer has reason to question the representation.[50] Under the amendment, the government must include FAR clauses 52.209-2 and 52.209-10 in contracts using funds appropriated in FY 2012. Moreover, the clauses prohibit the government from contracting with inverted domestic corporations and may prohibit the government from paying for contractor activities performed after the date when a contractor reorganises as an inverted domestic corporation or becomes a subsidiary of an inverted domestic corporation.[51]

### vii Proposed changes in rights in technical data and computer software

Under federal law, government or contractor rights in technical data and computer software are dependant on which party pays for development of the information. The party that funds the development typically obtains unlimited rights in the information. Where both parties fund development, the government typically obtains government purpose rights, allowing it unrestricted use within the government and use outside the government only for government purposes.[52] In today's economy, a company's intellectual property is considered very valuable, making its protection vital to any business. Section 815 of the National Defense Authorization Act for Fiscal Year 2012 made significant changes to the technical data rights statute found at 10 U.S.C. Section 2320.[53] The government has stated that the purpose of some of the changes is to enable the government to obtain technical data and software rights without having to pay twice for the information. Contractors, however, are skeptical with regard to the meaning of these changes and their effect on technical data and software developed at private expense. The full impact of the changes to the statute will not be understood until the government implements the corresponding regulations. The government has not issued any proposed rules implementing the changes as of the date of the publication of this chapter.

Under the new technical data rights statute, the DoD may challenge a contractor's data rights restriction through the DFARS validation process for up to six years, as opposed to the previous limit of three years.[54] Moreover, Congress provided the government with the right to release or disclose to third parties outside the government information that is necessary for 'segregation' or 'reintegration'.[55] Segregation should follow established policies that advise contractors to segregate their items, components, or processes down to the lowest identifiable level to protect proprietary information.[56] Integration, however, is a new type of information yet to be adequately defined in legislation or regulation. The amendment also allows the government to require delivery of any 'technical data that has been generated or utilized in the performance of a contract', as long as

50 FAR 9.108(b).

51 FAR 52.209-2 and FAR 52.209-10.

52 DFARS 252.227-7013(b).

53 National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81 Section 815.

54 10 U.S.C. Section 2321(d)(2)(A).

55 10 U.S.C. Section (a)(2)(D)(i)(II).

56 FAR 227.7103-4(b).

the government makes a determination that the data is needed for reprocurement, sustainment, modification, or upgrade of a major system or subsystem, a weapon system or subsystem, or any non-commercial item or process, and, the information (1) pertains to an item or process developed in whole or in part with federal funds; or (2) is necessary for segregation or reintegration.[57] Thus, the meaning of segregation and reintegration will have a significant impact on the type of information the government can obtain under the new regulations.

## IV SPECIAL CONTRACTUAL FORMS

The United States employs a number of different contract forms to procure goods and services. In 2012, several important regulatory changes affected the way these different forms are used. Three of the more notable changes included the government's effort to increase competition under multiple award contracts, promote the use of firm fixed-price contracts, and require major contractors to disclose their independent research and development projects.

### i Increased competition under multiple award contracts

A multiple award contract involves the government's issuance of an umbrella contract to a number of different vendors who then compete for individual orders issued under that umbrella contract. In theory, this contract form enables the government to procure more efficiently and with fewer contract personnel. But this form also lends itself to contracting practices that avoid proper competition. Congress has taken action in the last few years to ensure that the government can continue to use multiple award contracts but in a way that protects competition.

On 2 March 2012, the government amended the FAR to implement a section of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 to enhance competition in the purchase of supplies and services under multiple-award contracts.[58] The rule requires the government to provide notice of any order for supplies or services in excess of the simplified acquisition threshold to all vendors under a multiple award contract that offer the supplies or services in question. The government must ensure that all contractors responding to the order have an opportunity to submit an offer and for that offer to be fairly considered.[59] Notably, the government can provide notice to fewer than all of the contractors under the multiple-award contract as long as it provides notice to as many contractors as practicable. However, if notice is provided to fewer than all contractors, the government cannot make an acquisition unless: (1) it receives offers from at least three qualified contractors; and (2) a contracting officer notes in writing that despite its best efforts, it was unable to identify additional qualified contractors.[60] Government agencies can waive the competition requirements found in FAR 8.405-1

57 10 U.S.C. Section 2320(b)(9).

58 See 77 Fed. 12,927; FAR 8.405-1.

59 FAR 8.405-1(d)(3)-(4).

60 FAR 8.405-1(d)(3)(ii).

if they provide reasonable justification prepared and approved in accordance with FAR 8.405-6.[61] The government hopes that this new rule will protect competition while at the same time allowing the government to continue its use of multiple-award contracts.

### ii Limitation of cost-reimbursement contracts – preference for FFP contracting over cost-type contracting

Over the past 50 years, the government continuously has shifted its policy governing the use of fixed-price or cost-reimbursable contracts for major acquisitions. In fixed-price contracts, the contractor bears the risk that the cost to perform will exceed its estimate and even the total contract price. Such contracts pose special risks to the contractor in situations where cost estimates are hard to develop (e.g., research and development contracts involving new or untested technology). In the 1960s and 1970s, the government's use of a total package procurement concept, namely a combined fixed-price development and production contract, nearly led to the financial ruin of major defence contractors. In the 1980 and 1990s, Congress moved away from fixed-price contracting for complex development and initial production efforts toward a more equitable cost sharing between the government and its contractors. Now, in the realm of deficit spending and budget cuts, the pendulum has swung back in favour of fixed-price contracts and price-based competitions.

On 2 March 2012, the federal government adopted a final rule amending the FAR to address the use and management of cost-reimbursement contracts.[62] The new FAR Rule effectively encourages the government's use of fixed-price contracts by requiring additional justification for any other form of contract. The rule explicitly describes the circumstance when cost-reimbursement contracts can be used.[63] Any decision to use contracting other than fixed-price contracting requires supporting documentation that includes

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61 FAR 8.405-1(d)(1). Justification for limiting competition under FAR 8.405-6 include:

*a* an urgent and compelling need exists, and following the procedures would result in unacceptable delays;

*b* only one source is capable of providing the supplies or services required at the level of quality required because the supplies or services are unique or highly specialised; or

*c* in the interest of economy and efficiency, the new work is a logical follow-on to an original Federal Supply Schedule order provided that the original order was placed in accordance with the applicable Federal Supply Schedule ordering procedures. The original order or BPA must not have been previously issued under sole-source or limited-source procedures.

FAR 8.405-6(a)(1)(i).

62 77 Fed. Reg. 12,925.

63 FAR 16.301-2 provides that cost-reimbursement contracts can only be used when:

*a* circumstances do not allow the agency to define its requirements sufficiently to allow for a fixed-price type contract (see 7.105); or

*b* uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.

FAR 16.301-3 further limits cost reimbursement contracting to situations when:

a the factors in 16.104 have been considered;

the following information: (1) the reason a cost-reimbursement contract is appropriate; (2) acquisition plan findings to support the selection of a cost-reimbursement contract; and (3) acquisition resources necessary to award and manage a cost reimbursement contract.[64] These changes track the White House's commentary that contracting procedures should reduce risk to the government. This emphasis on shifting risk from the government onto contractors may well result in the further curtailing of cost-type contracts in favour of fixed-price arrangements, imposing added risk on contractors.

### iii Reporting of IR&D projects

On 30 January 2012, the DoD issued a final rule amending the DFARS to require major contractors to report independent research and development (IR&D) projects.[65] The rule requires reporting for major contractors, which include contractors whose covered businesses allocated more than $1.1 million in IR&D/bid and proposal costs to covered contracts during the preceding year.[66] Contractors submit their IR&D information to the Defense Technical Information Center.[67] The rule requires in-process reporting on IR&D projects for which the contractor seeks reimbursement as an allowable indirect cost.[68] The purpose of the rule is to 'increase effectiveness by providing visibility into the technical content of industry IR&D activities to meet DoD needs and promote the

*b* a written acquisition plan has been approved and signed at least one level above the contracting officer;

*c* the contractor's accounting system is adequate for determining costs applicable to the contract or order; and

*d* prior to award of the contract or order, adequate government resources are available to award and manage a contract other than firm-fixed-priced (see 7.104(e)). This includes appropriate government surveillance during performance in accordance with 1.602-2, to provide reasonable assurance that efficient methods and effective cost controls are used.

64 See FAR 16.103(d)(1)(iv) requiring for other than fixed-price contracting:

*a* an analysis of why the use of other than a firm-fixed-price contract (e.g., cost reimbursement, time and materials, labour hour) is appropriate;

*b* rational that detail the particular facts and circumstances (e.g., complexity of the requirements, uncertain duration of the work, contractor's technical capability and financial responsibility, or adequacy of the contractor's accounting system), and associated reasoning essential to support the contract type selection;

*c* an assessment regarding the adequacy of government resources that are necessary to properly plan for, award, and administer other than firm-fixed-price contracts; and

*d* a discussion of the actions planned to minimise the use of other than firm-fixed-price contracts on future acquisitions for the same requirement and to transition to firm-fixed-price contracts to the maximum extent practicable.

65 77 Fed. Reg. 4632-01.

66 DFARS 231.205-18(a)(ii).

67 DFARS 231.205-18(c)(iii)(C).

68 77 Fed. Reg. 4632-01.

technical prowess of our industry'.[69] The DoD asserts that it needs this information in order to determine the most effective way to disburse IR&D funds without infringing on the freedom of contractors to decide which technologies to pursue as part of their IR&D funding.[70]

## V THE BIDDING PROCESS

Federal regulations govern the bidding process and impose obligations on both the federal government and its contractors. Cases decided in 2012 made clear that the government must issue solicitations appropriate for the goods and services it seeks to procure and evaluate bids in accordance with the terms of such solicitations. Contractors, too, must comply with the terms of any solicitation for which they submit a bid and bear responsibility for understanding the solicitation's requirements. As evidenced in the discussion below, an agency may not relax a solicitation's requirements to favour one bidder over another. Similarly, an agency may not modify an existing contract to circumvent its obligation to openly compete the procurement, but as seen below, what constitutes an improper modification may not always be apparent.

### i Solicitation defects

The federal government must conduct sufficient research to determine appropriate acquisition processes for procuring supplies and services. The GAO will sustain a protest if the government's inadequate preparations for the acquisition process led to a defective solicitation. For instance, the GAO sustained the protest in *Verizon Wireless*, because the General Services Administration ('GSA') failed to demonstrate that the terms of its solicitation accorded with customary commercial practice, as required by the FAR for the acquisition at issue.[71] In particular, the government issued a solicitation for blanket purchase agreements ('BPAs') for commercial wireless telecommunications products and services with telecommunication vendors under a federal supply schedule ('FSS') contract. The FAR requires the government to perform market research to ensure that the procurement of commercial items under FSS BPAs adheres to customary commercial practices.[72] The GSA's inadequate market research could not support such a determination.

In *DNO Inc*. the GAO found the US Deparment of Agriculture's solicitation defective because it failed to conduct adequate market research to support the decision not to set aside the contract for small businesses.[73] Contracting officers must make reasonable efforts to determine the likelihood of receiving at least two offers from capable small businesses in deciding whether to set aside the potential contract.[74] Failure to

69 77 Fed. Reg. 4632-01.

70 77 Fed. Reg. 4632-01.

71 *Verizon Wireless,* B-406854, B-406854.2, 17 September 2012, 2012 CPD paragraph 260 at 14.

72 Id. at 5.

73 *DNO Inc*., B-406256, B-406256.2, 22 March 2012, 2012 CPD paragraph 136 at 6.

74 Id. at 4.

make reasonable efforts to do so, as was the case in *DNO Inc.*, constitutes an improper acquisition.

### ii Relaxation of bid requirements

Federal agencies must evaluate offers in accordance with the stated evaluation criteria and may not depart from the evaluation criteria by relaxing the solicitation's requirements in favour of one offeror over another. In *Tipton Textile Rental, Inc.*, the agency improperly awarded the contract to an offeror whose proposal did not meet the solicitation requirements.[75] The request for quotation required a barrier wall between clean and soiled linens.[76] The successful offeror proposed either a barrier wall or the use of exhaust fans.[77] The GAO found that the agency impermissibly relaxed the solicitation's requirement for a barrier wall, and in doing so provided an unfair advantage to the successful offeror.[78] 'It is a fundamental principle of government procurement that contracting officials may not announce in the solicitation that they will use one evaluation scheme and then follow another without informing competitors of the changed plan and providing them an opportunity to submit proposals on that basis.'[79] Thus, the GAO found the agency's conclusions inconsistent with the solicitation requirements and sustained the protest.

### iii Permissible contract modifications

While the federal government may modify contracts to secure additional supplies or services, it must ensure that the modification falls within the scope of work of the original contract. Otherwise, the government will have essentially issued a new contract, or sole source award, without having followed the requisite competition requirements under the Competition in Contracting Act ('CICA').[80] In such instances, other contractors may bring a protest arguing that the government should have issued a solicitation and followed appropriate competition requirements to issue a new contract for the additional work.

In *Ceradyne, Inc. v. United States*, Ceradyne was one of five contractors, including BAE, under contract to produce up to a collective total of 320,000 pieces of body armour.[81] Under the terms of the solicitation, if a contractor defaulted, the contractor next in line for award would be offered the opportunity to produce the defaulted quantities.[82] After one of the contractors defaulted, however, the government offered the additional work to BAE under the notion that BAE's price made it next in line for award.[83] BAE accepted and the government modified BAE's contract by increasing its

75 *Tipton Textile Rental, Inc.*, B-406372, 9 May 2012, 2012 CPD paragraph 156.

76 Id. at 2.

77 Id. at 4.

78 Id. at 9.

79 Id. (citing *Eloret Corp.*, B-402696, B-402696, 16 July 2010, 2010 CPD paragraph 182 at 10).

80 41 U.S.C. Section 3301.

81 *Ceradyne, Inc. v. United States*, 103 Fed. Cl. 1, 2 (2012).

82 Id. at 6.

83 Id. at 10.

production total.[84] Ceradyne protested, claiming that BAE was not next in line and that the BAE contract modification constituted an improper sole source award to BAE.[85] The Court of Federal Claims dismissed the protest after concluding that the modification to BAE's contract fell within the scope of the original procurement.[86] The court concluded that the original solicitation had advised Ceradyne that such a modification could occur and further determined that it did not substantially change the type or quantity of the product or service at issue, or the costs.[87] In particular, the court found that the modification did not change the contract specifications, the unit price or the overall quantity of goods to be produced.[88] The solicitation reasonably advised offerors of the potential for a modification to increase the quantities to be produced up to the 320,000 ceiling.[89]

*California Industrial Facilities Resources, Inc., v. United States*, also involved a protest of an alleged improper contract modification in violation of CICA.[90] There, the government awarded four indefinite-delivery, indefinite-quantity contracts for special operations survival and shelter equipment.[91] The solicitation described the type of products expected to be procured and identified the procuring agencies. The plaintiff argued that the government's delivery order for certain environmental control units ('ECUs') fell outside the scope of the original contract because they were not intended for special operations missions.[92]

The Court looked to whether the proposed delivery order 'materially departs from the scope of the underlying contract, such that potential offerors in the original procurement would not have anticipated that the agency would issue delivery orders of that nature under the contract'.[93] The Court concluded that the solicitation encompassed special operations equipment intended for a variety of missions beyond special operations missions. Thus, the delivery order for ECUs fell within the scope of the original solicitation.[94]

*Ceradyne* and *California Industrial* illustrate the hurdles faced by a contractor that seeks to challenge a modification or delivery order as falling outside the scope of the contract. Such challenges can succeed only upon a showing that the changes were both substantial and not reasonably anticipated by any of the offerors under the original solicitation.

84 Id.

85 Id. at 2.

86 Id. at 13.

87 Id. at 13.

88 Id. at 13–14.

89 Id.

90 *California Industrial Facilities Resources, Inc., v. United States*, 104 Fed. Cl. 589 (2012).

91 Id. at 591.

92 Id. at 596–97.

93 Id.

94 Id. at 597.

### iv Late proposals

Contractors must adhere to the proposal submission requirements in the solicitation. In *Onsite OHS*, the government instructed offerors to submit their proposals via FedConnect.[95] FedConnect, a centralised web portal, provides contractors with two channels for communicating with the government: (1) the 'response center' for submitting responses to solicitations; and (2) the 'message center' for asking questions related to a solicitation.[96] Onsite submitted its proposal through the 'message center' and never received confirmation that its proposal was received. Three months after award, Onsite inquired about the status of the contract and learned that the government never considered its proposal because it had not been submitted properly through the 'response center.'[97] GAO explained that '[i]t is an offeror's responsibility to ensure that its proposal is delivered to the proper place at the proper time, and through the method authorized in the solicitation.'[98] Onsite bore the risk of its proposal being untimely because it failed to learn how to use the FedConnect system properly.[99]

## VI ELIGIBILITY

### i Qualification to bid

The government imposes various eligibility requirements on contractors depending on the nature of the contract and the goals the government seeks to advance. Some requirements seek to ensure fairness and integrity in the procurement process while others advance certain social policy goals such as the promotion of small business. Cases decided in 2012 interpreted a number of these requirements.

### ii Conflicts of interest

The federal government prohibits personal as well as organisational conflicts of interest ('OCIs') in its procurements. OCIs involve situations where an organisation's interests, relationships or knowledge may impair its objectivity, create bias or create an unfair advantage in the procurement process.[100] The United States has issued regulations to prevent OCIs in federal procurement. The FAR provides representative examples of OCIs that must be avoided, but is careful to note that other OCIs might exist and that each individual contracting situation must be examined using 'common sense, good judgment

95 *Onsite OHS*, B-406449, 30 May 2012, 2012 CPD paragraph 178 at 1.

96 Id.

97 Id. at 2.

98 Id. at 4 (citing *Richcon Federal Contractors, Inc.*, B-403223, 12 August 2010, 2010 CPD paragraph 192 at 2.

99 Id.

100 FAR 9.502(c) (explaining that OCIs may occur when circumstances arise that create an actual, or potential conflict of interest on an instant contract, or when the work on an instant contract might create an actual or potential conflict of interest on a future acquisition).

and sound discretion' to determine whether an actual or potential OCI exists.[101] The three representative examples found in the FAR involve unequal access to information, biased ground rules and impaired objectivity. Unequal access to information refers to a situation where a contractor has access to non-public or proprietary information that may provide it with an unfair advantage on a future contract.[102] Biased ground rules occurs when a contractor assists with the preparation of a solicitation or specifications on a future contract and thus could bias the competition for the future work in its favour. The contractor might also have an unfair advantage because of its superior knowledge of the government's future requirements.[103] Finally, impaired objectivity occurs when a contractor's work could involve evaluating itself on another contract.[104] Issues regarding OCIs typically arise during the acquisition process as contractors object to restrictive OCI solicitation terms, the refusal to consider a proposal because of an alleged OCI, or the objection to an awardee's alleged OCI.

In *McTech Corp.*, the GAO upheld a federal agency decision to exclude a contractor from competition because of an OCI creating the appearance of an unfair competitive advantage.[105] In *McTech*, the federal agency excluded McTech from competition because of evidence that McTech shared a close relationship with the entity that prepared the RFP. McTech and the entity that prepared the RFP were involved in several joint ventures together and had a Small Business Administration-approved mentor/protégé agreement.[106] The GAO agreed with the agency and found its decision reasonable that the parties' relationship created an actual or potential OCI.[107] McTech argued that it did not actually receive any information through this relationship and that, even if it had, it would not have obtained a competitive advantage because the specifications and drawings were published in the solicitation.[108] The GAO rejected McTech's argument, noting that 'agencies may reasonably conclude that a contractor's preparation of specifications for a contract gives the contractor an inherent advantage sufficient to warrant exclusion from the competition.'[109] The GAO also explained that an agency may introduce supplemental information and analyses regarding its OCI determination at any time during the protest proceedings.[110] McTech, however, continued proceedings by filing its protest in the

101 FAR 9.505.

102 See FAR 9.505-4.

103 See FAR 9.505-1 and 9.505-2.

104 See FAR 9.505-3.

105 *McTech Corp.*, B-406100, B-406100.2, 8 February 2012, 2012 CPD paragraph 97.

106 Id. at 2–3.

107 Id. at 7.

108 Id.

109 Id. (citing *Lucent Techs. World Servs. Inc.*, B-295462, 2 March 2005, 2005 CPD paragraph 55 at 8).

110 Id. at 7 (citing *Lucent Techs. World Servs. Inc.*, B-295462, 2 March 2005, 2005 CPD paragraph 55 at 6 n. 3).

Court of Federal Claims.[111] The agency took corrective action and the Court eventually dismissed McTech's protest as moot.[112]

In contrast, the GAO denied a protest in *SeKON Enterprise, Inc*, claiming that the awardee had an OCI because of an alleged previous relationship with a company it would oversee under the new contract.[113] The contracting officer investigated the alleged association and found no direct relationship or teaming arrangement that could be considered a potential OCI.[114]

The GAO also agreed with the federal agency's OCI determination in *Cognosante, LLC*.[115] There, the federal agency excluded a contractor from a federal contract for auditing Medicaid claims. The excluded contractor, Cognosante, was also serving as a Medicaid auditor on a state contract.[116] The state contract reimbursed Cognosante on a contingency fee based on the amount of overpayments identified for recoupment, while the federal contract compensated the contractor on a cost-plus-award-fee basis.[117] Cognosante submitted a mitigation plan that recognised a potential OCI stemming from the fact that it may have an incentive to report improper claims under the contingency fee based state contract. Cognosante's mitigation plan proposed to separate or firewall the teams working on the two contracts. [118] The GAO found that the contracting officer reasonably found that an OCI existed which could not be adequately mitigated.[119] In making its decision, the GAO noted that it had found in a previous decision that a 'firewall arrangement is virtually irrelevant to an OCI involving potentially impaired objectivity' because the conflict applied to the organisation and not the individual employees separated by the firewall.[120]

### iii Past performance

Federal agency acquisition officials often review a contractor's performance on previous contracts to determine whether the contractor can successfully perform on the subject procurement. Such a past performance evaluation, as is the case with other evaluation criteria, must be made in accordance with the evaluation criteria provided in the solicitation. In *Supreme Foodservice GmbH*, the GAO sustained a protest because the federal agency did not evaluate the awardee's past performance in accordance with the

111 *McTech Corp v. US,* 105 Fed. C1. 726 (2012)

112 *McTech Corp v. US,* 109 Fed. C1. 28 (2013).

113 *SeKON Enterprise, Inc.*, B-405921, B-405921.2, 17 January 2012, 2012 CPD paragraph 26 at 9.

114 Id.

115 *Cognosante*, *LLC*, B-405868, 5 January 2012, 2012 CPD paragraph 87.

116 Id. at 3.

117 Id. at 2.

118 Id. at 3.

119 Id. at 4.

120 Id. at 5 (citing *Nortel Gov't Solutions, Inc.*, B-299522.5, 30 December 2008, 2009 CPD paragraph 10 at 6).

stated evaluation criteria.[121] The solicitation required the federal agency to review prior contracts of a defined dollar threshold on an individual basis. Instead, the federal agency improperly aggregated the awardee's prior contracts, none of which met the dollar threshold on an individual basis.[122] The federal agency also arbitrarily considered some information outside of a 12-month window while refusing to consider other information outside of the 12-month window.[123] In *Philips Healthcare Informatics*, the GAO sustained the protest because the agency failed to document that it had evaluated past performance information as required by the solicitation.[124] While the GAO will defer to a federal agency's judgement as to the relevance of past performance, it 'will question an agency's evaluation conclusions where they are unreasonable or undocumented'.[125]

### iv Responsibility

Contractor 'responsibility' is a prerequisite for award, and refers to the general ability and the will of the contractor to perform the work.[126] The FAR provides criteria for determining whether a contractor can be deemed responsible. Pursuant to the FAR, the contractor must:

*a* have adequate financial resources;
*b* be able to comply with the required or proposed delivery schedule;
*c* have a satisfactory performance record;
*d* have a satisfactory record of integrity and business ethics;
*e* have the necessary organisation, experience, accounting and operational controls, and technical skills;
*f* have the necessary production, construction, and technical equipment and facilities; and
*g* be qualified and eligible for award under applicable laws and regulations.[127]

Federal agencies are '"generally given wide discretion" in making responsibility determinations and in determining the amount of information that is required to make

121 *Supreme Foodservice GmbH*, B-405400.3, et al., 11 October 2012, 2012 CPD paragraph 292

122 Id. at 8. In a follow-on protest on the subsequent award, Supreme Foodservice challenged the agency's past performance evaluation *Supreme Foodservice GmbH*, B-405400.6, B-405400.7, 27 March 2013, 2013 WL 1324949. This time the GAO denied Supreme Foodservice's protest because the agency's past performance evaluation was reasonable and consistent with the evaluation criteria. Id.

123 Id. at 12.

124 *Philips Healthcare Informatics*, B-405382.2, *et al.*, 14 May 2012, 2012 CPD paragraph 220 at 11.

125 Id. at 9 (citing *Clean Harbors Envtl. Servs., Inc.*, B-296176.2, 9 December 2005, 2005 CPD paragraph 222 at 3).

126 FAR 9.103.

127 FAR 9.104-1.

a responsibility determination'.[128] The protester bears the burden of demonstrating that the federal agency's responsibility decision was arbitrary and capricious.[129]

In *Afghan American Army Servs. Corp v. United States*, the contractor protested the federal agency's non-responsibility determination based on an alleged forgery of contract documents on a previous contract.[130] The alleged forgeries were the subject of a proposed debarment proceeding. The contractor had no prior notice of the alleged forgeries on the previous contract. After learning of them, it requested additional information from the contracting officer so that it could conduct its own investigation.[131] Eventually, the suspension and debarment office dismissed the proposed debarment for lack of evidence.[132] The Court of Federal Claims allowed the protester to supplement the record with evidence of this dismissal of the proposed debarment and found that the agency acted arbitrarily in refusing to allow the contractor to respond to the allegations or to conduct its own investigation.[133] The federal agency contracting officer improperly relied on the unsubstantiated referral for proposed debarment without allowing the protester to investigate or respond.[134]

### v Social-economic buying preferences

The United States government uses its procurement policies to promote certain socio-economic concerns, including small business, minority-owned business, women-owned business, veteran-owned small business ('VOSB') and service disabled veteran-owned small business ('SDVOSB'). As a means of supporting veterans, the Veterans Benefits, Health Care, and Information Technology Act of 2006 requires the Administrator of the Department of Veterans' Affairs ('VA') to establish goals for awarding contracts to VOSBs and SDVOSBs.[135] To accomplish this, the Act and implementing regulations require VA contracting officials to conduct market research to determine whether there is a reasonable likelihood that two or more responsible VOSBs can meet the contract requirements at a fair and reasonable price.[136] The Act requires VA contracting officials to restrict competition to VOSBs and SDVOSBs if the market analysis provides for sufficient

128 *Afghan American Army Servs. Corp. v. United States*, 106 Fed. Cl. 714, 722 (2012) (quoting *Impresa Construzioni Geom. Domenicao Garufi v. United States*, 238 F.3d 1324, 1334-35 (Fed. Cir. 2001)).

129 *Afghan American*, 106 Fed. Cl. at 723 (citing *Impresa*, 238 F.3d at 1337).

130 Id. at 716.

131 Id. at 723.

132 Id. at 724.

133 Id. at 724-25, 728.

134 Id. at 727-28.

135 38 U.S.C. Sections 8127-28.

136 38 U.S.C. Section 8127(d); 48 C.F.R. Section 810.001; 48 C.F.R. Section 819.7005; 48 C.F.R. Section 819.7006.

competition.[137] This requirement to restrict competition to VOSBs is commonly referred to as the 'rule of two'.[138]

For several years, the VA and the GAO have disagreed over the application of the Act and its contracting preferences for orders issued under the General Services Administration's ('GSA') FSS. The VA has maintained that it does not have to determine if the rule of two applies before it can issue orders against the FSS.[139] In several bid protest decisions, the GAO has held that the rule of two does apply to such actions and that the VA must determine that there are not two potential qualified VOSB or SDVOSB offerors before using the FSS to satisfy a requirement.[140] Notwithstanding the GAO's rulings, the VA has consistently refused to follow the GAO recommendations in these decisions.

In *Kingdomware Technologies, Inc. v. United States*, the Court of Federal Claims sided with the VA with regard to whether the VA had to abide by the market analysis requirement in the Act prior to engaging in an FSS acquisition.[141] The plaintiff in *Kingdomware Technologies* brought an action in the Court of Federal Claims for an injunction to compel the VA to comply with the Act and conduct market analysis and consider restricting competition to VOSB and SDVOSB prior to procuring goods and services through the FSS.[142] The Court held that the VA has discretion as to when to exercise the contracting preferences granted by the Act in order to achieve the goals required to be set by the Act.[143] Therefore, the VA could issue orders against the FSS without first conducting market research to determine whether the rule of two applied. The GAO issued a subsequent decision addressing the issue in response to the Court of Federal Claims, holding in *Kingdomware Technologies*. In *Kingdomware Technologies*, the GAO decided that it would no longer entertain protests involving the VA's decision not to follow the Act's competition restrictions prior to acquiring goods or services by FSS.[144] The GAO noted that in spite of its precedent with regard to the issue, protesters would not be able to obtain any meaningful relief in light of the Court of Federal Claims,

137 38 U.S.C. Section 8127(d).

138 *Kingdomware Technologies, Inc. v. United States*, 107 Fed. Cl. 226, 232 (2012).

139 See *Aldevra*, B-405271, 11 October 2011, 2011 CPD paragraph 183 ('VA argues that neither the VA Act, nor the VA's implementing regulations, require the agency to consider SDVOSB and VOSB set-asides prior to determining whether to purchase goods or services through the FSS program.')

140 See, e.g., *Aldevra*, B-405271, 11 October 2011, 2011 CPD paragraph 183 (holding that the VA must conduct the market analysis required under the Veterans Benefits, Health Care, and Information Technology Act of 2006 prior to making award under FSS procedures).

141 *Kingdomware Technologies, Inc. v. United States*, 107 Fed. Cl. 226 (2012).

142 Id. at 229.

143 Id. at 244.

144 *Kingdomware Technologies*, B-407232.2, 13 December 2012, 2012 CPD paragraph 351 at 3 (on reconsideration).

decision in *Kingdomware* and the VA's express announcement that it would not follow the GAO's recommendation.[145]

## VII AWARD

The selection of a federal contractor must be based on the evaluation process established for the source selection. For example, a contract awarded pursuant to a 'best value' procurement must constitute the best value to the government as opposed to a different criterion such as 'low price'. A number of cases decided in 2012 clarify the government's obligation to issue an award that complies with the stated bidding criteria.

### i Agency failure to follow evaluation criteria

The government must evaluate proposals in accordance with the stated evaluation criteria of the request for proposal ('RFP'). Imposing unstated evaluation criteria into the source selection process renders a federal agency's decision irrational and unreasonable. 'Although agencies are not required to identify each and every element encompassed within the solicitation's evaluation scheme, unstated evaluation considerations must reasonably be subsumed within the stated considerations.'[146] In *IBM Global Business Servs.*, the protester contended that the agency improperly introduced unstated evaluation criteria when it gave the awardee credit for proposing an earlier full operating capability ('FOC') date.[147] IBM argued that the RFP makes no mention of FOC. The agency claimed that the term and its meaning was an implicit requirement of the solicitation's technical/management evaluation factor.[148] The GAO disagreed, finding that the FOC was not subsumed within the stated criteria because the RFP did not define the term or establish a schedule for achieving the FOC date. Therefore, the federal agency improperly introduced unstated evaluation criteria by relying on the awardee's FOC schedule in making its best-value trade-off analysis.[149]

### ii Unequal treatment

Federal agency evaluations must treat all offerors equally during the source selection process. 'It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals even-handedly against

145 Id. ('Although our Office is not bound by the court's decisions, its decision in *Kingdomware*, together with the VA's position on the meaning of this statute, effectively means that protesters who continue to pursue these arguments will be unable to obtain meaningful relief.')

146 *IBM global Business Servs.*, B-404498, B-404498.2, 23 February 2011, 2012 CPD paragraph 36 at 4 (citing *Mnemonics, Inc.*, B-290961, 28 October 2002, 2003 CPD paragraph 39 at 6).

147 Id. at 3.

148 Id.

149 Id. at 5-6.

the solicitation's requirements and evaluation criteria.'[150] The GAO sustained a protest in *The Emergence Group*, for, among other reasons, the federal agency's failure to treat the protester equally with the awardees.[151] The federal agency found a weakness in the protester's failure to submit a contingency plan for evacuating US personnel from a hostile foreign environment. The RFP, however, did not require the submission of contingency plans as part of the proposal. Importantly, none of the other offerors provided such plans, but the federal agency assigned a weakness only to the Emergence Group for the lack of plans.[152] Thus, the federal agency treated the Emergence Group's proposal differently than the other offerors.

*Bayfirst Solutions v. United States* also involved an improper evaluation that treated the protester and awardee differently.[153] The federal agency assigned risks or weaknesses to offeror proposals when the resumes for personnel did not meet the solicitation's minimum education and experience requirements. The agency, however, did not assign any weakness to the awardee's (VSI) proposal for resumes that failed to meet minimum requirements. Specifically, Bayfirst was not assigned a strength for submitting resumes that met the requirements while VSI was assigned a strength despite including resumes that clearly did not meet the minimum requirements.[154] '[T]his constitutes either disparate treatment of offerors, or an irrational evaluation of VSI's and BayFirst's proposals.'[155] The deficiencies in the federal agency's evaluation did not end there. The agency assigned strengths to VSI for excellent past performance ratings on contracts dissimilar to the instant procurement, while assigning weaknesses to Bayfirst for excellent past performance ratings on dissimilar contracts. The Court of Federal Claims concluded that this disparate treatment could not withstand scrutiny.[156]

### iii Flawed best value

In a 'best value' procurement, the federal government is not required to select the offeror with the lowest price. Instead, the government considers the price in relation to other factors, such as technical capability, management and past performance, to determine which proposal offers the best value to the government. To do this, the agency performs 'a price/technical tradeoff […] to determine whether one quotation's technical superiority is worth its higher price'.[157] Agencies must also provide a sufficient record to demonstrate that the source selection decision was reasonable. In *NikSoft*, the agency

150 *The Emergence Group*, B-404844.5, B-404844.6, 26 September 2011, 2012 CPD paragraph 132 at 7 (citing *CRA Assocs., Inc.*, B-282075.2, B-282075.3, 15 March 2000, 2000 CPD paragraph 63 at 5).

151 *The Emergence Group*, B-404844.5 at 9.

152 Id.

153 *Bayfirst Solutions v. United States*, 102 Fed. Cl. 677 (2012).

154 Id. at 686.

155 Id.

156 Id. at 690-91.

157 *NikSoft Systems, corp.*, B-406179, 29 February 2012, 2012 CPD paragraph 104 at 7 (citing *InnovaTech, Inc.*, B-402415, 8 April 2010, 2010 CPD paragraph 94 at 2, 6 n.8).

made the award solely based on the awardee's technical superiority. The GAO found such a determination inconsistent with the solicitation and regulations that required a best-value trade-off analysis that included a price analysis.[158] In short, the agency should have considered NikSoft's lower price when conducting its best-value analysis.

*J.R. Conkey & Assocs., Inc. dba Solar Power Integrators*, also involved a flawed best-value analysis.[159] There, the source selection authority decided, based on the fact that the technical factor was more important than price, to consider only the three proposals with the highest ranked technical scores. But best-value determinations involve a trade-off analysis between technical superiority and price. In eliminating proposals with lower technical rankings that also had lower prices, the federal agency failed to determine 'whether one proposal's superiority under the non-price factor is worth a higher price'.[160] Simply put, even where the solicitation provides that price is less important than non-price factors, the agency must still meaningfully consider cost or price in making a best-value selection.[161] The agency's failure to consider the apparently acceptable and lower priced proposals to determine whether the price premium associated with the technically superior proposals was justified rendered the source selection decision unreasonable.

## IX CHALLENGING AWARDS

As the above discussion makes clear, the government does not always comply with the obligations imposed upon it by regulation or case law to conduct fair and unbiased procurements. In such instances, contractors with standing can protest. Depending on the nature of the impropriety, protests can be brought either at the solicitation stage or after the award is made. But contractors need to be aware of the procedural requirements, including timeliness, attendant to the filing of bid protests.

### i Developments in bid protest jurisdiction

***Standing***

A protester must have standing in order to bring the case – it must show prejudice to challenge agency action in a government procurement. *Comint Systems Corp. v. United States* affirmed a dismissal in the Court of Federal Claims for lack of standing to protest the agency's actions.[162] For post-award bid protests, 'the plaintiff must show that it had a "substantial chance" of receiving the contract to make a showing of prejudice.'[163] Applying that principle to Comint's situation, the Federal Circuit found that Comint failed to identify any issues with the agency's marginal quality/capability rating that amounted to arbitrary or capricious actions. Quality/capability was the most important

158 Id. at 8.

159 *J.R. Conkey & Assocs., Inc. dba Solar Power Integrators* , B-406024.4, 12 August 2012, 2012 CPD paragraph 241.

160 Id. at 9.

161 Id. at 9 (citing e-LYNXX Corp., B-292761, Dec. 3, 2003, 2003 CPD paragraph 219 at 7).

162 *Comint Systems Corp. v. United States*, 700 F.3d 1377 (Fed. Cir. 2012).

163 Id.

factor and the awardees received an outstanding rating for this factor. Thus, Comint could not establish that it would have had a substantial chance of receiving the award because it was unable to demonstrate any issues with the agency's rational decision to assign Comint a marginal quality/capability rating.[164]

***Corrective action***

The Court of Federal Claims has jurisdiction to hear bid protests under the Tucker Act.[165] In an important decision having a significant impact on the Court of Federal Claims' jurisdiction, the Federal Circuit in *Systems Application & Technologies, Inc.*, *v. United States* ('SA-Tech') affirmed an awardee's right to bring a protest action in the Court of Federal Claims objecting to an agency's intended corrective action to recompete the procurement.[166] After the Army awarded the contract to SA-Tech, the incumbent, Kratos, filed a protest with the GAO. The GAO notified the parties that it found merit in Kratos' protest, leading the Army to agree to take corrective action. The Army intended to terminate SA-Tech's contract, amend the solicitation and recompete the contract. As a result, the GAO dismissed the protest as academic.[167] SA-Tech filed a bid protest in the Court of Federal Claims, arguing, *inter alia*, that the Army's decision to take corrective action was arbitrary, capricious and unreasonable. The Court agreed and granted SA-Tech's request for injunctive relief, prohibiting the Army from proceeding with corrective action. The Army appealed the jurisdictional issues to the Federal Circuit, which found jurisdiction and affirmed the Court of Federal Claims decision.[168] The Federal Circuit explained that the Tucker Act provides a 'broad grant of jurisdiction over objections to the procurement process.'[169] SA-Tech objected to the Army's amendment of the solicitation, which was clearly covered by the Tucker Act. The fact that the Army had not yet taken corrective action was irrelevant with regard to jurisdiction. 'This court has made clear that bid protest jurisdiction arises when an agency decides to take corrective action even when such action is not fully implemented.'[170] Furthermore, SA-Tech's status as awardee did not bring the action outside the scope of the Tucker Act and instead under the Contract Disputes Act. Once the court had jurisdiction under the Tucker Act, it could properly exercise its equitable powers to provide injunctive relief prohibiting the Army from terminating SA-Tech's contract.[171] The Court found that SA-Tech had standing because it would experience competitive injury if forced to re-compete on a contract it had already won.[172] Finally, the Federal Circuit agreed with the Court of Federal Claims

164 Id. at 1384.

165 28 U.S.C. Section 1491.

166 *Systems Application & Technologies, Inc.*, *v. United States*, 691 F.3d 1374 (Fed. Cir. 2012).

167 Id. at 1379–80.

168 Id. at 1380.

169 *SA-Tech*, 691 F.3d at 1381.

170 Id. at 1381.

171 Id. at 1382.

172 Id. at 1382–83.

that the claim was ripe for review because the Army had made clear its intentions and had taken steps to engage in corrective action.[173]

### ii Time to challenge in the GAO

The GAO has very strict filing and timeliness rules for bid protests. Contractors must be aware of the GAO's filing rules or risk having their untimely protests dismissed. Pre-award protests based on alleged improprieties in a solicitation must be filed prior to bid opening or the time set for receipt of initial proposals.[174] Any other protest must be filed within 10 days after the ground of protest is known or should have been known, except for 'protests challenging procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required'.[175] In those situations, the protest must be filed no later than 10 days after the debriefing. The GAO, however, may consider an untimely protest for good cause shown 'or where it is determined that a protest raises issues significant to the procurement system'.[176] The GAO issued several important decisions in 2012 that reiterate the importance of timely filing a protest action.

The GAO clarified in *Millennium Space Systems, Inc.*, that a broad agency announcement ('BAA') is not a 'procurement' conducted on the basis of competitive proposals for purposes of the debriefing exception to GAO's timeliness requirements.[177] The debriefing exception requires protests for procurements based on competitive proposals to be filed 10 days after the debriefing. Analysing the regulations governing BAA procurements, the GAO concluded that a BAA is a procurement based on 'other competitive procedures', and not 'competitive proposals' as required by the GAO's rules.[178] Thus, the debriefing exception did not apply to BAA procurements.

In *Cyberdata Technologies, Inc.*, the GAO invoked the 'significant issue' exception to its timeliness rules.[179] The GAO will decide what constitutes a significant issue on a case-by-case basis.[180] 'We generally regard a significant issue as one of widespread interest to the procurement community and that has not been previously decided.'[181] In *Cyberdata*, the protester did not timely file a challenge to the terms of the solicitation prior to the closing date. The significant issue warranting the timeliness exception, however, was that the GAO had not previously reviewed, in the context of a blanket purchase agreement under the FSS, the requirement that price or cost be considered

173 Id. at 1384.

174 4 C.F.R. Section 21.2(a)(1).

175 4 C.F.R. Section 21.2(a)(2).

176 4 C.F.R. Section 21.2(c).

177 *Millennium Space Systems, Inc.*, B-406771, 17 August 2012, 2012 CPD paragraph 237 at 5–6.

178 Id. at 5.

179 *Cyberdata Technologies, Inc.*, B-406692, 8 August 2012, 2012 paragraph 230 at 4.

180 Id. at 3 (citing *Pyxis Corp.*, B-282469, et seq., 15 July 1999, 99-2 CPD paragraph 18 at 4).

181 Id. at 3–4 (citing *Satilla Rural Electric Membership Corp.*, B-2138187, 7 May 1990, 90-1 CPD paragraph 456 at 3).

before excluding a technically acceptable proposal from consideration for award.[182] The GAO concluded that 'under the FAR, price is the one factor that, at a minimum, must always be considered when determining best value for purposes of establishing a BPA under the FSS'.[183] While the GAO sustained Cyberdata's protest and recommended amendment of the solicitation, it did not recommend recovery of Cyberdata's protests costs because Cyberdata failed to timely file its protest.[184]

## X OUTLOOK

The procurement landscape in the United States for 2013 and beyond will be shaped and influenced by a continued reduction in government spending and the potential impacts of sequestration. These factors likely will lead to contract terminations, with war-time contingency contracts at greater risk. Contractors and agency procurement officials have started planning for furloughs and reductions in workforce. If sequestration occurs, both the agency acquisition community and government contractors will be adversely affected. In response to budget concerns, the OMB has issued guidance to agencies to combine their purchasing power through strategic sourcing, requiring the major procurement agencies to engage in new government-wide procurements in 2013–2014, and to share federal financial services platforms.[185] As decreased spending results in fewer contracts, bid protest cases will continue to be on the rise, in part because overextended agency officials may be more prone to commit errors in source selections. In addition, government contractors will be less willing to abandon contract disputes with the government in the interest of 'customer relations', leading to more claims litigation at the United States Court of Federal Claims and agency boards of contract appeals. Finally, legislation and court decisions regarding the False Claims Act in recent years have expanded the number of eligible plaintiffs, and weakened potential contractor defences. These developments will fuel increases in False Claims Act lawsuits and recoveries from government contractors. Finally, these combined factors – fewer contracts, increased competition, fixed-price-based awards, lower revenue, and reduced profits – will set the stage for a series of mergers, acquisitions and divestitures within the industry. While the industry has gone through cyclical downturns before, most recently in the 1990s at the end of the Reagan-era defence build-up, the changes may be particularly dramatic given the serious deficit issues faced by the United States and the growing vacuum in seasoned government acquisition officials in the procurement workplace.[186]

182 Id. at 4.

183 Id.

184 Id. at 7.

185 Memorandum from Deputy Director for Management, Executive Office of the President, Office of Management and Budge, *Improving Acquisition through Strategic Sourcing*, dated 5 December 2012.

186 Charles Clark, Are We Headed for an Acquisition Brain Drain? Government Executive, 21 March 2013 www.govexec.com/contracting/2013/03 (reporting OMB officer's warning that as many as 40 per cent of the 36,000 federal contracting officers could retire in the next five years).

## Appendix 1

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